FILED
MAY 3 1974
MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1251

CHARLES FELTON, Warden, Illinois State Penitentiary, Joliet Branch,

Petitioner,

vs.

SAMUEL SAIKEN,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN J. O'TOOLE
29 S. LaSalle Street
Chicago, Illinois 60603

PETER GEORGES
10 S. LaSalle Street
Chicago, Illinois 60603

Attorneys for Respondent

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED 1

ARGUMENT:

I.

Habeas Corpus Is A Great Constitutional Privilege And There Is No Higher Duty Than To Maintain It Unimpaired 2

II.

An Affidavit Based Solely Upon Hearsay Is Insufficient To Establish Probable Cause For The Issuance Of A Search Warrant Where It Does Not Contain Any Underlying Circumstances Of Fact Or Any Underlying Circumstances Of Reliability Of The Informant 4

CONCLUSION 10

List Of Authorities Cited

Aguilar v. Texas, 378 U.S. 108 (1964) 6

Brown v. United States, 365 F. 2d 976 (D.C. Cir. 1966) 7

Fay v. Noia, 372 U.S. 391 (1963) 3

Harris v. Nelson, 394 U.S. 286 (1969) 4

Johnson v. Avery, 393 U.S. 483 (1969) 3, 4

Jones v. U.S., 362 U.S. 257 (1960) 6

Spinalli v. U.S., 393 U.S. 410 (1969) 6

United States v. Mitchell, 457 F. 2d 513 (6th Cir. 1972) 7

United States v. Mohler, 442 F. 2d 1172 7

United States v. Roth, 391 F. 2d 507 (7th Cir. 1967) .. 9

United States v. Ventresca, 380 U.S. 102 (1965) 9

United States ex rel Cardaio v. Casscles, 446 F. 2d 632 (2d Cir. 1971) 8

Wade v. Mayo, 334 U.S. 672 (1948) 2

Fourteenth Amendment to the Constitution of the United States 5, 10

28 U.S.C. 2241 et seq. 2

In The

Supreme Court of the United States

October Term, 1973

No. 73-1251

CHARLES FELTON, Warden, Illinois State Penitentiary, Joliet Branch,

Petitioner,

vs.

SAMUEL SAIKEN,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

QUESTIONS PRESENTED.

1. Whether the constitutional right of a state prisoner to Habeas Corpus in the Federal Courts may be abrogated?

2. Whether an affidavit which is based solely on hearsay, which contains no underlying circumstances of fact, and no facts relating to the reliability of the informant is sufficient to establish cause for the issuance of a search warrant?

ARGUMENT.

I.

HABEAS CORPUS IS A GREAT CONSTITUTIONAL PRIVILEGE AND THERE IS NO HIGHER DUTY THAN TO MAINTAIN IT UNIMPAIRED.

The petitioner seeks the plenary consideration of this Honorable Court to dilute and ultimately destroy the protection afforded a state prisoner by the Constitution of the United States and Congressional enactment (28 U.S.C. 2241 et seq.) (Pet. 7-10).

Plaintiff's argument is couched in generalities, dealing with public policy and alleged infringement on the integrity and sovereignty of the several states; an argument which is not new to this Court (*Wade* v. *Mayo*, 334 U.S. 672 (1948)). In *Wade* the Court stated (681-682):

> "Fear has sometimes been expressed that the exercise of the district court's power to entertain *habeas corpus* petitions under these circumstances might give rise to frequent instances of a single federal judge upsetting the judgment of a state court, often the highest court of the state. But to restrict the writ of *habeas corpus* for such reason is to limit it on the basis of a discredited fear."

In the ultimate, petitioner would have this Court negate and destroy an inherent and fundamental right, which was born in the Magna Charta; developed by the Constitution of the United States; and achieved maturity in the Judiciary Act of February 5, 1867 and in the decisions of this Court.

The history and development of this "Great Writ" is comprehensively, yet succinctly, set forth in *Fay* v. *Noia*, 372 U.S. 391 (1963) 399-426, after which the court stated:

"We have reviewed the development of habeas corpus at some length because the question of the instant case has obvious importance to the proper accommodation of a great constitutional privilege and the requirements of the federal system. Our survey discloses nothing to suggest that the Federal District Court lacked the *power* to order Noia discharged because of a procedural forfeiture he may have incurred under state law. On the contrary, the nature of the writ at common law, the language and purpose of the Act of February 5, 1867, and the course of decisions in this Court extending over nearly a century are wholly irreconcilable with such a limitation. At the time the privilege of the writ was written into the Federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law, which in England stemmed ultimately from Magna Charta but in this country was embodied in the written Constitution. Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum. Obedient to this purpose, we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules plainly must yield to this overriding federal policy."

Subsequent to *Fay* in *Johnson* v. *Avery*, 393 U.S. 483 (1969) the Court stated (485):

"This Court has constantly emphasized the fundamental importance of the writ of habeas corpus in

> our constitutional scheme, and the Congress has demonstrated its solicitude for the vigor of the Great Writ. The Court has steadfastly insisted that 'there is no higher duty than to maintain it unimpaired.' *Bowen* v. *Johnston,* 306 U.S. 19, 26, 83 L. Ed. 455, 461, 59 S. Ct."

and in *Harris* v. *Nelson,* 394 U.S. 286 (1969) the Court stated:

> "There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law. This Court has insistently said that the power of the federal courts to conduct inquiry in habeas corpus is equal to the responsibility which the writ involves: 'The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary.' *Townsend* v. *Sain, supra,* at 312, 9 L. Ed. 2d at 785."

The very suggestion by petitioner of the infringement of the right of a state prisoner to habeas corpus in the federal courts, under the banner of the integrity of the state, belies and negates the very purpose of the writ.

II.

AN AFFIDAVIT BASED SOLELY UPON HEARSAY IS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE FOR THE ISSUANCE OF A SEARCH WARRANT WHERE IT DOES NOT CONTAIN ANY UNDERLYING CIRCUMSTANCES OF FACT OR ANY UNDERLYING CIRCUMSTANCES OF RELIABILITY OF THE INFORMANT.

The Court of Appeals held that the respondent's conviction was obtained by the use of evidence discovered in

an illegal search in violation of his rights under the Fourteenth Amendment to the Constitution of the United States.

The affidavit of Officer Young, which formed the basis for the issuance of the search warrant in this case, provides as follows:

"State of Indiana
County of Porter—ss:
Before the Hon. Harry Estler, Justice of the Peace
In the matter of a search for a dead human body believed to have been illegally procured.

Docket 25, Page 420, Cause No. 10-229

HARRY YOUNG swears that by virtue of information voluntarily conveyed to him by one JOEL SAIKIN on Tuesday, the 18th day of February, 1969, affiant has good reasons to believe, and does believe, that a dead human body, to-wit, female approximately seventeen (17) years of age is secreted in and about the following real estate in Porter County, Indiana:

> The East ½ of the Southeast ¼ of the Southwest ¼ of Section 17, Township 37 North, Range 5 West of the Second Principal Meridian, containing about 20 acres more or less,

said real estate being the property of Sam D. and Minnie Saikin, said dead body being secreted in the following place and manner, to-wit: buried beneath the ground behind the goose house on said premises, originally buried under or near a manure pile located behind or near the goose house on said premises, said manure pile subsequent thereto having been removed.

Under and according to the provisions of Acts 1905, page 169, paragraph 61, the same being codified at Burns Indiana Statutes 9-607, that the Honorable Judge of this Court, taking with him such constables

and police officers as he shall designate, enter, inspect and search said premises for such dead female human body as soon as may be reasonably convenient to said Court and said judge.

Further affiant sayeth not.

Harry Young,
Harry Young, Affiant

Subscribed and sworn to before me, on this 19th day of February, 1969.

Harry W. Estler,
Justice of the Peace.

My Commission expires 12-31-71."

The search warrant issued herein must stand or fall solely on the contents of the aforementioned affidavit of Officer Young, for it was the only matter presented to the Justice of the Peace to establish probable cause for the issuance of the warrant.

Where an affidavit is based upon hearsay, as herein, *the Judge must be informed in the affidavit* of: (a) some underlying circumstances from which the informant concluded that the property sought was where the informant claimed it was; and (b) *the affidavit must also contain* some underlying circumstances and facts from which the affiant concluded that the informant was reliable. *Aguilar* v. *Texas,* 378 U.S. 108 (1964); *Spinalli* v. *U.S.,* 393 U.S. 410 (1969); *Jones* v. *U.S.,* 362 U.S. 257 (1960).

With respect to these two requirements, the affidavit of Officer Young is totally deficient. There is absolutely no underlying circumstances stated therein upon which Joel Saikin believed the body to be located in that spot, nor is there any allegation or even mention of his reliability.

Petitioners contend that an identified citizen whose true name is used is presumed to be credible. The cases

cited in support thereof are not applicable herein and are an incomplete statement of the law.

In *Brown* v. *United States,* 365 F. 2d 976 (D.C. Cir. 1966), the Defendant was arrested by two police officers for a minor traffic violation. One of the officers, after the stop, heard a radio message reporting a robbery and the general description given fit both the Defendant and his motor vehicle. The Court held that these facts give rise to probable cause for the arrest of the Defendant and the search of his motor vehicle even though the general information came from the victim of the crime who was unknown to the arresting officers. An arrest and search without a warrant was proper.

In *United States* v. *Mitchell,* 457 F. 2d 513 (6th Cir. 1972), the Court held that where, at the time of Defendant's arrest, officers had knowledge that a bank robbery had been committed earlier the same afternoon by a male bandit dressed as a woman, eyewitness had given officers description of vehicle similar to Defendant's and bearing similar license number, the vehicle was parked at Defendant's residence and the Defendant was in the process of packing his suitcase at the time of arrest, the officers had probable cause to make an arrest without warrant to search made incident to the arrest was valid.

United States v. *Mohler,* 442 F. 2d 1172, affirmed the conviction where affidavits in support of search warrants obtained by an F.B.I. Agent at San Diego, who detailed information received from an F.B.I. Agent at Tucson, who got most of his information from the victim identified in the affidavit as the victim, by name and address and detailed the whole story. Further, the affidavits state the location of the Defendant's photographic equipment

and of certain photographs, and gave a description of the home of the Defendant, his trailer, camper and cars. Part of this was confirmed from the California Department of Motor Vehicles. There was also some corroboration of the victim by another woman, who was also fully identified in the affidavits.

United States ex rel Cardaio v. *Cassales,* 446 F. 2d 632 (2d Cir. 1971) affirmed the denial of a petition by a state prisoner for Writ of Habeas Corpus holding that information an informer gave police was sufficient to constitute probable cause to believe that the Petitioner was the armed robber who had taken marijuana from the informer where the informer related to police that the marijuana had been taken from him by a robber at gunpoint, gave a description of Petitioner and furnished them with Petitioner's first name and telephone number. Police then confirmed that the given telephone number was listed under a person with such a first name. Upon arrival at the address of Petitioner, given by the telephone company, the police were told that a person by such a first name was there and, upon entering, officers observed Petitioner, who conformed to informer's description. Petitioner was arrested and searched without warrant.

In this cause, one Joel Saiken was named in the process issued by the Justice of the Peace, but there is no showing if, in fact, there was such a person, who he was, how he obtained knowledge of the facts, was he in fact credible or his information reliable. It is clear that the Justice of the Peace was not afforded reasonable grounds for issuing the warrant.

The Petitioners' contention that the extremely detailed nature of the information given to the officers established the validity of the information is without merit. The warrant merely recites that affiant had information voluntarily conveyed to him by one Joel Saiken on a given date, without reciting any details as to when and by whom was the human body illegally procured, when and by whom was said body buried, where on the premises was the goose house located and when and by whom was the manure pile removed.

In reply to Petitioner's contention that the Court read the warrant in a grudging negative manner disapproved in *United States* v. *Ventresca,* 380 U.S. 102 (1965), we would quote *United States* v. *Roth,* 391 F. 2d 507 (7th Cir. 1967),

> "Although we are mindful of the Supreme Court's admonition in *Ventresca* that 'affidavits for search warrants, • • • must be tested and interpreted by Magistrates and Courts in a common sense and realistic fashion,' we may not overlook the equally important charge that sufficient specificity of an affidavit for a search warrant 'is essential if the Magistrate is to perform his dettached function and not serve merely as a rubber stamp for the police'."

In *United States* v. *Roth,* 391 F. 2d 507 (7th Cir. 1967) dealt with inherently defective hearsay on hearsay. In further protecting the rights of the accused the Court made inquiry into the quantum of underlying circumstances necessary to sustain an affidavit for a search warrant due to the absence of the disclosure of informant's source of information. Since this was not the factual situation before this Court, this Court was limited to the four corners of the search warrant.